Bauer (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(C)(A)-1187–06 OF 2017 AND B-02(C)(A)-1188–06 OF 2017
DAVID WONG, HAMID SULTAN AND RHODZARIAH BUJANG JJCA
22 FEBRUARY 2018

Building and Construction Law — Construction contracts — Adjudication of payment disputes — Whether court could interfere with adjudication matters — Whether Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') applicable to construction contract — Whether adjudicator exceeding jurisdiction when ignoring to apply construction clause — Construction Industry Payment and Adjudication Act 2012 s 35

The respondent was awarded a subcontract by the appellant for the supply and installation of spun piles for a contract sum of RM1,850,000 ('the project'). The employer of the project was ITD Vertex Consortium ('the ITD Vertex'). Unfortunately, ITD Vertex was wound up in 2012 and this was informed to the respondent by the appellant who had also assured that steps would be taken to recover monies from ITD Vertex to pay the respondent. In 2013, the appellant lodged its proof of debt with the liquidator of ITD Vertex and the amount included the amounts, certified and uncertified, claimed by the respondent. Naturally, payment claims by the respondent had stalled in view of the predicament of ITD Vertex and this consequentially gave rise to payment disputes between the parties. Premised on the disputes, the respondent on 23 August 2016 commenced adjudication proceeding under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') against the appellant. The central dispute before the learned adjudicator and learned High Court judge was the applicability of s 35 of the CIPAA vis a vis of cl 11.1 of the construction contract. The learned judge dismissed the appellant's application to set aside an adjudication decision and allowed the enforcement of the aforesaid adjudication decision by the respondent. Hence, this appeal.

Held, allowing the appeals with agreed costs of RM10,000 subject to payment of allocator fees:

(1) The jurisdiction of an adjudicator is circumscribed by the structure of the Act and if therein were provisions which defined the limitation of the adjudicator's jurisdiction, the court must view the same as jurisdiction markers. In the context of the present appeal, s 35 of the CIPAA outlawed 'pay when paid clauses' and hence an adjudicator was given the power to ignore such clauses and determine the liability of the non-paying party on

other causes of action. Such extension of power of an adjudicator by the Act concerned the jurisdiction of the adjudicator which squarely came within the fourth ground of s 15 of the CIPAA (see para 22).

(2) The applicability of s 35 of the CIPAA was depending on whether the CIPAA was intended to have a retrospective operation. There was no express provision in the CIPAA excluding or including construction contracts made prior to the commencement of the CIPAA. Unless there were clear words in the legislation to the contrary, any legislation affecting substantive rights must be given a prospective effect. Similarly, if the legislation was procedural in nature, that legislation must be given a retrospective effect unless clear words in the same showed to the contrary (see paras 23 & 26).

(3) In the context of s 35 of the CIPAA, it related to a substantive right of an individual. That substantive right was nothing less than the right to freedom of contract where parties were entitled to regulate their business affairs subject of course to any prohibitions recognised by law. Hence the contention by learned counsel for the appellant that it was totally unfair that the respondent could now rely on s 35 of the CIPAA to void cl 11 of the construction contract. In so far as s 35 was concerned, cl 11 of the construction contract remained afoot and valid. As this was related to the jurisdiction of the learned adjudicator, the learned adjudicator had exceeded his jurisdiction when he ignored cl 11 of the construction contract (see paras 30–32).

[Bahasa Malaysia summary

Responden telah diawardkan satu subkontrak oleh perayu untuk membekalkan dan memasukkan cerucuk berputar untuk satu kontrak keseluruhan berjumlah RM1,850,000 ('projek tersebut'). Majikan untuk projek tersebut ialah ITD Vertex Consortium ('ITD Vertex'). Malangnya, ITD Vertex telah digulungkan pada 2012 dan responden telah dimaklumkan oleh perayu bahawa langkah-langkah akan diambil untuk menuntut semula wang untuk membayar responden. Pada 2013, perayu telah menunjukkan bukti keberhutangan dengan pelidikuasi IDT Vertex dan jumlah hutang tersebut, termasuklah yang disahkan dan yang tidak disahkan, dituntut oleh responden. Secara semulajadi, tuntutan bayaran oleh responden adalah tergantung disebabkan penafian daripada ITD Vertex dan ini menyebabkan terjadinya pertikaian pembayaran antara pihak-pihak. Disebabkan pertikaian tersebut, responden memulakan prosiding adjudikasi di bawah Akta Bayaran Industri Pembinaan dan Adjudikasi 2012 ('Akta tersebut') terhadap perayu. Pertikaian utama di hadapan adjudikator dan hakim Mahkamah Tingfi adalah pemakaian s 35 Akta tersebut bersesama klausa 11.1 kontrak pembinaan. Hakim telah menolak permohonan perayu untuk mengenepikan keputusan adjudikasi dan membenarkan penguatkuasaan keputusan adjudikasi tersebut oleh responden. Maka, ini merupakan rayuan untuk keputusan hakim tersebut.

Diputuskan, membenarkan rayuan dengan kos RM10,000 tertakluk pada fi alokator:

(1) Bidang kuasa adjudikator dilihat pada struktur Akta tersebut dan sekiranya ada peruntukan yang menghadkan bidang kuasa adjudikator, mahkamah juga hendaklah melihat pada perkara yang sama melibatkan bidang kuasa pembuat. Dalam konteks rayuan semasa, s 35 Akta tersebut melarang 'klausa bayar apabila dibayar' dan oleh itu adjudikator telah diberi kuasa untuk mengabaikan klausa tersebut dan menentukan liabiliti pihak yang berhutang untuk kausa tindakan yang lain. Kuasa tambahan adjudikator oleh Akta tersebut adalah berkenaan dengan bidang kuasa adjudikator yang termaktub dalam alasan keempat di bawah s 15 Akta tersebut (lihat perenggan 22).

(2) Pemakaian s 35 Akta tersebut adalah bergantung sama ada Akta tersebut beroperasi dan perlu beroperasi secara retrospektif. Tiada apa-apa peruntukan dalam Akta tersebut yang mengecualikan atau memasukkan kontrak pembinaan dibuat sebelum Akta tersebut digunapakai. Melainkan sekiranya terdapat perkataan yang jelas dalam peruntukan yang mengatakan sebaliknya, sebarang peruntukan perundangan yang mempengaruhi hak-hak substantif hendaklah beroperasi secara prospektif. Keadaan yang sama akan terpakai sekiranya peruntukan undang-undang tersebut adalah prosedur secara semula jadi, undang-undang tersebut hendaklah beroperasi secara retrospektif melainkan adanya pengecualian yang jelas dalam peruntukan undang-undang tersebut (lihat perengaan 23 & 26).

(3) Dalam konteks s 35 Akta tersebut, ianya berkaitan dengan hak substantif seorang individu. Hak tersebut adalah tidak lain tidak bukan adalah hak kebebasan dalam kontrak di mana pihak-pihak berhak untuk menjalankan perniagaan tertakluk pada mana-mana kekangan yang disahkan oleh undang-undang. Oleh itu, hujahan peguam terpelajar perayu yang mengatakan adalah tidak adil untuk responden bergantung pada s 35 Akta tersebut untuk membatalkan penggunaan klausa 11 kontrak pembinaan. Pemakaian s 35 masih menyebabkan klausa 11 kontrak pembinaan masih terpakai dan sah. Disebabkan ini berkatian dengan bidsng kuasa adjudikator, adjudikator tersebut telah bertindak di luar bidang kuasa apabila mengabaikan klausa 11 dalam kontrak pembinaan tersebut (lihat perenggan 30–32).]

Notes

For cases on adjudication of payment disputes, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4227–4230.

Cases referred to

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776, CA (refd)

Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358, CA (refd)

UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case [2015] 11 MLJ 499; [2015] 5 CLJ 527, HC (distd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 15, 28, 35, 36(1)

Appeal from: Originating Summons No BA-24C-10–02 of 2017 and BA-24C-34–12 of 2016 (High Court, Shah Alam)

Sanjay Mohan (Adam Lee with him) (Mohanadass Partnership) for the appellant.
Rohan Arasoo (Amy Hiew with him) (Harold & Lam Partnership) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us and they are heard together as they emanated from one decision in which the learned judge dismissed the appellant's application to set aside an adjudication decision and allowed the enforcement of the aforesaid adjudication decision by the respondent. The said decision was premised on a finding that the 'paid when pay' clause in a construction contract was void by virtue of s 35 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA 2012').

[2] We heard the appeals and had reserved on decision we have since considered further submission from respective counsel and now give our decision grounds.

BACKGROUND FACTS

[3] The respondent was awarded with a subcontract by the appellant for a project known as 'Cadangan Membina 3 Blok 39 Tingkat 689 Unit Rumah Pangsa Kos Tinggi dan 23 Unit Kedai 2 Tingkat yang mengandungi Kemudahan Tadika, Dewan Serbaguna, Surau serta 4 Tingkat Podium Tempat Letak Kereta & Rekreasi dengan 1 Tingkat Basemen di atas Lot PT 3901, HS (D) 61423, Jalan Aman Fasa III (Kg Berembang), Mukim Ulu Klang, Daerah Gombak, Selangor Darul Ehsan' for the supply and installation of Spun Piles for a contract sum of RM1,850,000.

[4] The employer of the project was one ITD Vertex Consortium ('ITD Vertex'). Unfortunately, ITD Vertex was wound up in 2012 and this was informed to the respondent by the appellant who had also assured that steps would be taken to recover monies from ITD Vertex to pay the respondent. In 2013, the appellant lodged its proof of debt with the liquidator of ITD Vertex and the amount included the amounts, certified and uncertified, claimed by the respondent.

[5] Naturally, payment claims by the respondent had stalled in view of the predicament of ITD Vertex and this consequentially gave rise to payment disputes between the parties.

[6] Premised on the disputes, the respondent on 23 August 2016 commenced adjudication proceeding under the CIPAA 2012 against the appellant.

DECISION OF THE LEARNED ADJUDICATOR

[7] The central dispute before the learned Adjudicator was the applicability of s 35 of the CIPAA 2012 vis a vis of cl 11.1 of the construction contract.

[8] Clause 11.1 of the construction contract reads as follows:

> 11.0 Progress Payment
>
> 11.1 *All payments shall be made within 7 days from the date the Specialist Contractor received their related progress payment and subjected to 5% retention.* The Sub-Contractor shall submit his claims with measurement records of work done including demarcated sketches and/or delivery orders (where applicable), duly endorsed by the Specialist/Main Contractor's and Consultants authorised site staff. The cut-off date for the progress claim shall be on 20th day of each calendar month.

One can safely say that the aforesaid clause is a classic 'pay when paid' clause. It is also undisputed between parties that the mode of payment prior to the adjudication process had been as provided in cl 11 in that the appellant had no obligation to pay the respondent until payment had been received from the ITD Vertex.

[9] During the adjudication proceeding the CIPAA 2012 had become law and in it there is a specific provision outlawing the 'pay when paid' clauses. That provision is s 35 which reads as follows:

> 35 Prohibition of Conditional Payment
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> (1) Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.

A (2) For the purposes of this section, it is a conditional payment provision when:

(a) The obligation of one party to make payment is conditional upon that party having received payment from a third party; or

B (b) The obligation of one party to make payment is conditional upon the availability of funds of drawdown of financing facilities of that party.

[10] The crucial dispute in the adjudication process was the applicability of C s 35 of the CIPAA 2012 to the construction contract between the appellant and respondent which had existed prior to the CIPAA 2012 which came into force in 15 April 2014.

[11] The appellant's position was simple, and it was that if s 35 of the CIPAA D 2012 did not apply, then there was no obligation to pay the respondent as it was undisputed that ITD Vertex had not paid them. The position of the respondent was also simple and it was that cl 11 had been outlawed so to speak and the appellant cannot seek cover under the same.

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[12] The learned adjudicator on 23 November 2016 delivered his decision in which he found that s 35 of the CIPAA 2012 applied and consequently ignored cl 11 and relied on the right of 'progress payment' mode in determining whether the appellant was liable to the respondent. Having determined the F liability of the appellant, the learned adjudicator awarded the respondent a sum of RM906,034.

[13] In response to the decision of the learned adjudicator, the appellant filed an application to set aside the said adjudication decision pursuant to s 15 of the G CIPAA 2012.

[14] The respondent also took out an application to enforce the same pursuant to s 28 of the CIPAA 2012.

H THE HIGH COURT DECISION

[15] The learned judge in her grounds on the applicability of s 35 of the CIPAA 2012 said as follows:

I [12] It was this court's finding that clause 11 being a conditional payment clause had been rendered void by s 35 CIPAA which clearly states 'any conditional payment provision in a construction contract in relation to payment ... is void'. CIPAA including s 35 applies retrospectively and this Court can do no better than refer to *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor* [2015] 11 MLJ 499; [2015] 5 CLJ 527 where it was stated at pp 552–553, 557–558 and 576 as follows:

> [160] For this, I return to the ethos of CIPAA. Since it is to provide a speedy procedure for the temporary resolution payment disputes in construction contracts through the introduction of a fresh or a new forum called 'adjudication', it would be appropriate to say that such legislation is in character, truth and substance, procedural and adjectival legislation. Such legislation or statute is presumed in law to be applied retrospectively unless there is clear contrary intention in the statue itself ...;
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> [173] ... Hence, CIPAA which provides adjudication as an alternative forum for payment dispute resolution as opposed to resorting to the court and arbitration, a liberal and purposive interpretation must be adopted in relation to CIPAA. In so doing, the choice of an additional forum of resolution should surely be offered to all unless there is clear provision that it is not. Since there are no such provisions to allow for such an interpretation, CIPAA is retrospective insofar as the construction contract are concerned; and that would include the present construction contracts before the court; and
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> [225] It is therefore the conclusion of this court that it is the clear intention of Parliament that CIPAA applies to all construction contracts regardless of when those construction contracts were made; and that would extend to the payment disputes that arise under those construction contracts. The Act applies so long as the construction contracts are made in writing and that such construction contracts are carried out either wholly or partly within the territory of Malaysia. The only exception to this are those payment disputes where proceedings in relation to such disputes have already been commenced either by way of court proceedings or arbitration before the operation of the Act, that is, before 15 April 2014.

[16] Premised on the above, the learned judge sustained the application for enforcement of the adjudicator's decision and dismissed the application to set aside of the adjudicator's decision by the appellant.

OUR GROUNDS OF DECISION

[17] Learned counsel for the appellant takes the stand that there has been an excess of jurisdiction on the part of the learned adjudicator when he voided cl 11 premised on the applicability of s 35 of the CIPAA 2012. Hence his reliance on s 15 CIPAA 2012 which only allows limited grounds for the court to set aside and one of which relates to excess of jurisdiction.

[18] Opposing this contention, learned counsel for the respondent puts his contention as follows. The role of the courts in an adjudication matter must not delve into the merits of the decision of the adjudicator even when the adjudicator had erred on a point of law. In support of that contention, we are referred to the case of *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358 where it was held by Chadwick LJ:

A [85] The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfered with the decision of an adjudicator ...

B [86] It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels 'excess of jurisdiction' or 'breach of natural justice'. It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more
C likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the need of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be
D driven to insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash flow requirements of contractors and their subcontractors. The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes
E involving difficult questions of law would be referred to adjudication under the statutory scheme ...

[19] It is also pointed out to us that the aforesaid case was adopted by this
F court in the case of *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776 where it was held as follows:

[23] We express full agreement with what was said and further adopt it as the correct approach in our jurisdiction.

[24] This was simply a case where the losing party was not happy that it had
G obtained an unfavourable decision and tried its chance in the judicial system. The law as it exists now correctly limits the court's functions which expressly do not include the review the correctness of the adjudicator's decision. As pointed by the learned judge, the court's intervention is only in very exceptional circumstances which are far and few in between. The prima facie view of the court must be to
H affirm the adjudicator's decision unless the losing party can show that it has complied with the thresholds listed in s 15 of the CIPAA 2012.

[20] We have no issue with the legal principle that the court's role in adjudication matters in the context of CIPAA 2012 is very limited and they are
I set out in s 15 of the CIPAA 2012 which only provides four grounds:

(a) an adjudication decision procured through fraud or bribery;

(b) there had been a denial of natural justice;

(c) the adjudicator had not acted independently or impartially; and

(d) the adjudicator had acted in excess of jurisdiction. A

[21] It is our considered view that we are not dealing with a situation where the learned adjudicator had merely wrongly interpreted a clause of the construction contract. If that was so, we agree that the parties will have to live with that error of law. But what we have here is more than that and it is whether a provision in a Statute of Law applied to the construction contract with the result of voiding a clause therein. B

[22] The jurisdiction of an adjudicator is circumscribed by the stricture of the CIPAA 2012 and if therein are provisions which define the limitation of the adjudicator's jurisdiction, the court must view the same as jurisdiction markers. In the context of this appeal, we are dealing with s 35 which, as pointed out earlier, outlaws 'pay when paid' clauses and hence an adjudicator is given the power to ignore such clauses and determine the liability of the non-paying party on other causes of action. Such extension of power of an adjudicator by the CIPAA 2012, in our view, concerns the jurisdiction of the adjudicator which squarely comes within the fourth ground of s 15 of the CIPAA 2012. With that we move to the crucial issue of the applicability of s 35 of the CIPAA 2012 to the construction contract at hand. C D E

[23] The applicability of s 35 of the CIPAA 2012 depends in our view whether CIPAA 2012 was intended to have a retrospective operation. Regretfully there is no express provision in the CIPAA 2012 excluding or including construction contracts made prior to the commencement of the CIPAA 2012. In the circumstances, we are left with the task of seeking out the intention of Parliament and in doing that task we seek refuge or help from the established principles of interpreting statutes. F

[24] There is a legal principle of interpretation known as the 'Rule of Beneficial Construction'. The learned author in *Maxwell's Interpretation of Statutes* (12th Ed) at p 216 describes it as follows: G

> One of the most well-known statements of rule regarding retrospectively is contained in this passage from the judgment of RS Wright J in *Re Athlumney* (1898) 2 QB 511 at purchase price 551–552: H
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> > Perhaps no rule of construction is more firmly established than thus — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. I
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> The rule has, in fact, two aspects, for it, 'involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary'.

[25] In *Francis Bennion's Statutory Interpretation* (5th Ed), the learned author at p 316 in similar vein states as follows:

> The essential idea of legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex-post facto law is enshrined in the United States Constitution and in the Constitution of many American States, which forbid it. The true principle is that lex prospicit non respicit (law looks forward no back). As Willes, J said retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future act, and ought not to change the character of past transaction carried on upon the faith of the then existing law.

[26] Another tool of interpretation of statute is this. Unless there are clear words in the legislation to the contrary, any legislation affecting substantive rights must be given a prospective effect. Similarly, if the legislation is procedural in nature, that legislation must be given a retrospective effect unless clear words in the same show to the contrary (see *NS Bindra's Interpretation of Statute* (8th Ed) at pp 768–769).

[27] The principle distilled from the aforesaid principles of law is that if the legislation does not take away any substantive rights of the citizens of the state, then that legislation would be only 'procedural' in nature and can be interpreted as a retrospective legislation unless there are clear words to the contrary. Hence the question before us then is whether the CIPAA 2012 gives rise to 'substantive rights'.

[28] What then are substantive rights? Prior to the CIPAA 2012, claimants in the construction industry can only resort to either the courts or arbitral tribunal to settle their disputes. So to speak, access to the courts and arbitral tribunals were the only legal rights available to the claimants to claim for their contractual fees. With the advent of claim for their contractual fees. The CIPAA 2012 has in effect created a new regime in which claimants in the building industry can claim their contractual fees.

[29] Access to justice is in anyone's view a substantive right. Here the CIPAA 2012 has created and given a new avenue of access to justice to claimants in the construction industry. Hence the CIPAA 2012 is in essence a legislation relating to a substantive right. We are fully aware that within the CIPAA 2012 there also exist a procedural regime dictating as to how claims are to be

processed before the adjudicator. The procedural regime is nothing but a by-product or the consequence of the substantive right created by the CIPAA 2012.

[30] In the context of s 35, we are also of the view that it relates to a substantive right of an individual. That substantive right is nothing less than the right to freedom of contract where parties are entitled to regulate their business affairs subject of course to any prohibitions recognised by law. Section 35 in essence takes away the right of the parties to have their payment regime regulated by a 'pay when paid' mode. Here there is no dispute that prior to the adjudication process, the respondent only received payments when the appellant had been paid by ITD Vertex. Hence the contention by learned counsel for the appellant that it is totally unfair that the respondent can now rely on s 35 of the CIPAA 2012 to void cl 11 of the construction contract.

[31] There is also a presumption when interpreting statutes and that is that Parliament will not take away the entrenched right of individual retrospectively unless with clear words within the statute. As we are aware there are no such clear words in the CIPAA 2012. That being the case, there is no hesitation on our part to conclude that the CIPAA 2012 is prospective in nature. In so far as s 35 is concerned, cl 11 of the construction contract remains afoot and valid.

[32] As this relates to the jurisdiction of the learned adjudicator, we with respect say that he had exceeded his jurisdiction when he ignored cl 11 of the construction contract.

[33] In view of the decision, we, with respect, take a different view to the rationale expressed by the learned judge in *UDA Holdings Bhd*. In saying this, we find support from the learned author, Andrew Burr, who in his book, *International Contractual and Statutory Adjudication* in footnote 10 at p 221 had also expressed the view that the CIPAA 2012 is not a 'procedural legislation'. He premised his reasoning on s 36(1) of the CIPAA 2012 which allowes parties to contract out of the 'progress payment' regime. In the view of the learned author, such right to contract out is not consistent with the spirit and the intention of the CIPAA 2012 which is 'pay now argue later' and therefore he opines that the phrase 'unless otherwise agreed by parties' in s 36(1) ought to be deleted to reflect such spirit and intention.

CONCLUSION

[34] Setting aside a decision of an adjudicator can be done under limited circumstances as provided in s 15 and the courts will only interfere in exceptional circumstances. In our view that is the correct approach in the context of the CIPAA 2012 which is a regime where 'pay now and argue later'

A is the prevailing principle. However, when there is an excess of jurisdiction, the courts must intervene for the simple reason that the adjudicator is a creature of legislation and his or her powers are strictured by it.

B **[35]** In this case, the learned adjudicator voided cl 11 of the construction contract which as pointed out should not have been done. By doing so he had exceeded his jurisdiction.

C **[36]** In the circumstances, we allow the two appeals with agreed costs of RM10,000 subject to payment of allocator fees. We also set aside the orders of High Court and that of the learned adjudicator. The deposits of the appeals are also refunded to the appellant.

Appeals allowed with agreed costs of RM10,000 subject to payment of allocator fees.

D Reported by Mohd Kamarul Anwar

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